

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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APR -7 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2010-0375-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
THOMAS MICHAEL JAMES,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20003697

Honorable Kyle Bryson, Judge

REVIEW GRANTED; RELIEF DENIED

Thomas M. James

Douglas
In Propria Persona

H O W A R D, Chief Judge.

¶1 Petitioner Thomas James seeks review of the trial court's summary dismissal of his fourth notice of post-conviction relief. James was convicted after a jury trial of second-degree murder and sentenced to an aggravated prison term of nineteen years. We affirmed his conviction and sentence on appeal. *State v. James*, No. 2 CA-CR 2002-0135 (memorandum decision filed Sept. 18, 2003).

¶2 The trial court denied relief in James’s first three post-conviction relief proceedings, filed pursuant to Rule 32, Ariz. R. Crim. P. In each of those proceedings, James sought review by this court, and we also denied relief. *State v. James*, No. 2 CA-CR 2009-0129-PR (memorandum decision filed Jan. 15, 2010) (second and third Rule 32 proceedings); *State v. James*, No. 2 CA-CR 2006-0246-PR (memorandum decision filed Jan. 31, 2007) (first Rule 32 proceeding).

¶3 In James’s fourth Rule 32 proceeding, he relied on Rule 32.1(g), Ariz. R. Crim. P., to argue recent amendments to A.R.S. § 13-710(A) and the case of *Butler v. Curry*, 528 F.3d 624 (9th Cir. 2008)¹ constituted “new law” entitling him to sentencing relief. *See* Ariz. R. Crim. P. 32.1(g) (ground for Rule 32 relief includes “a significant change in the law that if determined to apply to defendant’s case would probably overturn the defendant’s conviction or sentence”); *see also* Ariz. R. Crim. P. 32.2(b) (claims asserted under Rule 32.1(g) not subject to preclusion for failure to raise on appeal or in previous collateral proceeding). The trial court summarily dismissed James’s notice for post-conviction relief, finding he had “failed to state meritorious reasons to substantiate his claims for an exception to preclusion as required by Rule 32.2(b), Ariz. R. Crim. P.” As detailed in its order, the court concluded (1) amendments to § 13-710 were neither substantive nor retroactive, and (2) James was precluded from claiming the court erred in

¹In *Butler v. Curry*, the Ninth Circuit held a California state court’s decision affirming a sentence dependent on judicial fact-finding, for a defendant whose conviction was not yet final before the Supreme Court’s decision in *Blakely v. Washington*, 542 U.S. 296 (2004), was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” 528 F.3d at 628-29, 639-41, *quoting* 28 U.S.C. § 2254(d)(1) (1996).

imposing an aggravated sentence, purportedly based on “new law” found in *Butler*, because the claim “could have been, and was, raised in prior proceedings.”

¶4 In his petition for review, James challenges the trial court’s ruling that amendments to § 13-710 did not constitute a significant change in the law entitling him to relief pursuant to Rule 32(g).² We review a trial court’s denial of post-conviction relief for an abuse of discretion. *See State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find none here.

¶5 First, we find no error in the trial court’s conclusion that § 13-710, as amended, does not reflect a substantive change to the statute in force when James committed his offense. *Compare* 2009 Ariz. Sess. Laws, ch. 82, § 7 *with* 1994 Ariz. Sess. Laws, ch. 236, § 5.

¶6 Similarly, we agree with the trial court that legislative revisions of sentencing statutes are not changes in the law that would apply retroactively to James’s case. “A basic principle of criminal law requires that an offender be sentenced under the

²James also seems to suggest on review that the trial court’s decision was “objectively unreasonable” because, he alleges, the court’s “intended preclusion of petitioner[’]s *Brady* [*v. Maryland*, 373 U.S. 83 (1963),] claims had factually impaired the truth[-]finding function, which has raised serious question about [the] accuracy of [the] guilty verdict and [the] sentencing phase.” But, in his petition below, James stated his allegations of *Brady* violations were presented “only for potential compelling mitigating material (evidence) for any future penalty phase.” Thus, he did not fairly present any *Brady* claims for the trial court’s consideration, and we will not address them on review. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (appellate court does not consider issues first raised in petition for review). Moreover, had James fairly presented the trial court with claims that the state had withheld exculpatory evidence in violation of *Brady*, the court would have been correct in finding such claims precluded, as we have already addressed them in a previous memorandum decision. *See James*, No. 2 CA-CR 2009-0129-PR, ¶¶ 3, 5, 6, 10 & n.3.

laws in effect at the time he committed the offense for which he is being sentenced.”
State v. Newton, 200 Ariz. 1, ¶ 3, 21 P.3d 387, 388 (2001); *see also* A.R.S. § 1-246
(notwithstanding subsequent statutory amendment, “offender shall be punished under the
law in force when the offense was committed”); *State v. Stine*, 184 Ariz. 1, 3, 906 P.2d
58, 60 (App. 1995) (“[P]ersons convicted of crimes in Arizona generally do not benefit
from subsequent changes of the statutory sentencing provisions.”).

¶7 The trial court’s order clearly set forth the issues James raised in his notice
of post-conviction relief and the reasons his notice was subject to summary dismissal.
We need not repeat that sound analysis here; instead, we adopt the court’s order. *See*
State v. Whipple, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

¶8 Accordingly, we grant review but deny relief.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge